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BEFORE THE

**Supreme Court of the United States**

OCTOBER TERM, 1943.

NO. 485

GUY WHITEFORD, *Petitioner*,

v.

THE HECHT COMPANY, a corporation, *Respondent*.

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA, BRIEF IN SUPPORT  
THEREOF, AND MOTION AS TO THE RECORD.**

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA.**

*To the Honorable, the Chief Justice and the Associate  
Justices:*

The petition of Guy Whiteford respectfully shows to this  
Honorable Court:

**A.**

**SUMMARY STATEMENT OF THE MATTER  
INVOLVED.**

1. The motions of the respondent in the trial court for  
peremptory instructions and judgment non obstante veredicto.

The petitioner filed his complaint (R. 1), subsequently  
amended (R. 8), in the District Court of the United States  
for the District of Columbia against the respondent, by

which he sought the recovery of a real estate broker's commission claimed to be due him for services rendered the respondent in connection with the lease of respondent's warehouse to the United States of America.

During the proceedings in the District Court, the respondent made motions for a directed verdict at the close of petitioner's evidence and again at the close of all the evidence. The same matter again was presented to the trial court on motion for judgment notwithstanding the verdict. All three motions were made on the ground of insufficient evidence with regard to the issue of procuring cause. Each, after extensive argument, was denied. In its memorandum opinion denying respondent's motion for judgment notwithstanding the verdict (R. 183) the trial court stated as follows:

"The third ground is that there was not sufficient evidence for submission to the jury on the issue of whether plaintiff was the procuring cause of the lease. In considering this point the Court must construe the evidence most favorably to the plaintiff and give the plaintiff the full effect of every legitimate inference therefrom. If then, upon the evidence so considered, reasonable men might differ, the motion should not be granted. On the other hand, if no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted.

"The record in this case is lengthy. *Counsel gave the Court the benefit of a full review of the evidence adduced at the close of the plaintiff's case on the motion then made for a directed verdict; fully reviewed the evidence adduced at the close of all the evidence on the motion for a directed verdict made at that time, and again fully reviewed the evidence on the oral argument on the motion here under consideration. Since the submission of this motion the Court has reviewed the evidence from the transcript of the record. It involves the activities and conduct of witnesses covering a period of over one year and three months. For the Court to review the evidence in this memorandum would further*

encumber the record and serve no useful purpose. Suffice it to say that *after having had the benefit of three arguments of counsel, written briefs and a personal review of the testimony, it is my opinion that reasonable men might differ on whether the plaintiff's efforts were the procuring cause of the entry into the lease agreement between the defendant and the United States upon a consideration of the evidence in this case most favorably to the plaintiff with the benefit of every legitimate inference therefrom.*

"The motion of the defendant to enter judgment in its favor notwithstanding the verdict for the plaintiff is therefore denied." (Italics supplied)

## 2. The evidence pertaining to the issue of procuring cause.

The evidence pertaining to the issue of "procuring cause" which the trial court found to warrant submission to the jury, and from which the jury found that the petitioner was the procuring cause of the lease agreement between the United States and the respondent, shows the following:

On February 10, 1936, the respondent, by its manager, George M. Quirk, requested the petitioner in writing "to prepare plans for the disposing of the G Street warehouse, which we will vacate October 1" (R. 10). The petitioner acknowledged receipt of respondent's letter two days later (R. 11), and between February 15 and 17, 1936, went to the office of Quirk to see what respondent "had in mind" (R. 11). In the course of the ensuing conversation, in which Quirk stated that respondent wished to sell the property, petitioner advised that he thought respondent's "best bet is to lease this building", and that "the building should be leased to the United States Government" (R. 13, 14). Quirk answered petitioner's suggestion by saying that he "had not thought of that", and that he preferred a private tenant (R. 13). However, permission was given to petitioner to submit the property for lease to the Federal Gov-

ernment (R. 14), although Quirk testified that, to the best of his recollection, he did not authorize petitioner to do so at this particular time, that is, in the course of this initial conversation between February 15 and 17, 1936 (R. 89).

Immediately after the above conference between Quirk and the petitioner, the latter went to the Office of Space Control, to see Clay J. Guthridge, Chief of Space Control, and submitted respondent's property (R. 14, 15). Of this submission to the Federal Government, petitioner claims respondent was immediately notified by telephone upon petitioner's return to his own office, which telephonic notification, however, "to the best of his recollection", is denied by Quirk (R. 90). Guthridge, on the other hand, admitted that the petitioner had been in his office for the purpose of submitting respondent's property to the Federal Government for lease, without, however, being able to fix the exact date of petitioner's visit (R. 131). This witness further stated that he could not deny that the petitioner discussed with him the matter of availability of respondent's property for occupancy by *any* government agency (R. 194).

In addition to having gone to the Office of Space Control to discuss the property with Guthridge, petitioner took an employee of Space Control, Ralph McAllister, to respondent's property in the early spring of 1936 (R. 71), around the middle of April, 1936 (R. 55), of which inspection Quirk was notified by the petitioner (R. 188). McAllister, in turn, testified that the property had never been offered to Space Control prior to the time of his inspection together with the petitioner around the middle of April, 1936 (R. 77). Regarding this inspection of the property, Guthridge testified that McAllister discussed the property with him (R. 132); that the property was discussed "when Mr. McAllister was making his inspection of buildings, because he came in and said, 'I was shown these various buildings,'" and that "the G Street building was one of them that he, McAllister, reported on " (R. 135).

McAllister testified that it was his "usual procedure" to report each day either to Guthridge or to his assistant, Melvin C. Russell, on his daily activities and that the fact of his inspection of the property together with the petitioner was "in all probability" reported (R. 76).

In September, 1936, the petitioner, upon permission from the respondent (R. 21), accepted the assistance of Carl G. Rosinski, another real estate broker, specializing in the leasing of business properties (R. 79), for the immediate purpose of working on a prospect concerning the lease of the property to the Social Security Board (R. 79). A discussion, which the respondent had with the petitioner and Rosinski at the end of September, 1936, resulted in Quirk's statement that he wanted more rent than the Federal Government was legally permitted to pay—that is, a rental greater than 15% of the assessed value of the property, which would have amounted to a little over \$38,000.00 per annum. Quirk suggested on this occasion that petitioner and Rosinski attempt to have the Office of the Assessor of the District of Columbia raise the assessed value of the property so as to create the formal basis for a higher rental which the Government could legally pay. Both brokers refused to do that (R. 25, 80, 81).

Under date of November 18, 1939, Rosinski approached the respondent again by letter asking whether respondent was now ready "to deal as previously suggested", that is, on the basis of 15% of the then assessed value of the property (R. 26, 27). Respondent answered that it "would not be interested in leasing \* \* \* in accordance with \* \* \* previous suggestions" (R. 27), and Quirk, on cross-examination, admitted that the purport of this answer was an unqualified refusal to entertain any rental proposition from the Government "under any conditions" (R. 191, 192).

However, after the respondent had thus repeatedly and categorically refused to consider the Federal Government as a tenant at a cash rental which the Government, under

the law, was permitted to pay, it entered into direct negotiations with the Federal Government. Quirk testified that the cause for respondent's change of mind with regard to a tenancy of the Federal Government was the fact that respondent was ready to vacate the property; that it had to do something with the building, and "*it was the best we could do with it*" (R. 97, 98).

Guthridge, although he had stated on direct examination that according to his recollection neither the petitioner nor Rosinski were the cause of his getting in touch with Quirk (R. 128), admitted, unequivocally, on cross-examination, *first*, that McAllister did discuss the building with him (R. 193); *second*, that among the sources of his information that respondent's property was available, was the discussion he had with McAllister (R. 136), which discussion, according to "the usual procedure" of reporting each day (R. 76), *must have taken place around the middle of April, 1936, that is to say, prior to any listings or propositions by other real estate brokers interested in the same property*; and, *third*, referring to later written submissions of the same property by other brokers, that he remembered the availability of the building without the necessity of "thumbing over the file", containing such other later written listings (R. 132, 133). As far as the evidence shows that the property was also submitted to Space Control by other brokers, it is established that the earliest submission after that of Whiteford was that of Henry K. Jawish, dated July 16, 1936 (R. 150). Another submission by Frank J. Mulkern had taken place on October 6, 1936 (R. 130).

Jawish listed the property with Melvin C. Russell, Chief of the District of Columbia Space Control Section. Regarding the date of that listing, July 16, 1936, Russell could not recall how many days prior thereto Jawish had called on him personally in reference to the property (R. 195), but stated that he himself became associated with Space Control only in April or May, 1936 (R. 149, 194), that is, *after the date the petitioner had submitted the property to Guth-*

*ridge and shown it to McAllister*, so that Russell's further statement to the effect that the property was called to *his* attention *solely* by Jawish (R. 152), does not denote any priority or exclusiveness of listing on the part of Jawish, but rather the non-presence of this witness at a time when the petitioner was acting in the same matter by contacting other employees of Space Control. Neither Jawish nor Mulkern claimed a commission.

The evidence further shows that Quirk, at a time when he was in direct negotiations with the Federal Government, that is, after January 20, 1937, not only did leave unanswered letters of the petitioner, dated March 26 and May 12, 1937, respectively (R. 34), in which letters petitioner continued his efforts to obtain the consent of Quirk to accept the Federal Government as a tenant for a yearly cash rental as authorized by law (R. 30), but, in addition, requested the petitioner to change the text of his sign on the property so as to offer separate floors for rent (R. 31, 39, 190), and, knowingly, let the petitioner go to the additional expense of circularizing real estate brokers by printed notices of such changed offer (R. 190), *although at the very same time respondent felt bound by its oral agreement of March 22, 1937, to lease to the Federal Government* (R. 103, 192).

The petitioner testified (R. 69, 70)—which testimony was fully confirmed by the testimony of Mrs. Helen R. Sams, petitioner's secretary at that time (R. 195, 196)—that the respondent informed him over the telephone on June 1, 1937, that the property had been rented and that the petitioner could take down his sign. On this occasion petitioner testified that Quirk made the following statement:

"Well," I said, "Mr. Quirk, why did you take the deal now from the Government when we have been hounding on you all this time and trying to get you to take the deal that we offered you?"

"Well, he said, "*you finally convinced me that it was the best thing to do*". He said, "*You hounded on me*

*so long and you used so many arguments as to why we should do it that," he said, "I thought it was the best thing for us to do." (Italics supplied) (R. 70).*

This telephone conversation of June 1, 1937, Quirk did not recall, nor did he deny it (R. 193), although he stated also that the petitioner called him "sometime around June 1st"; that he did not know "whether it was exactly June 1st or not" (R. 191). Quirk denied, however, of having ever told petitioner that because of the latter's persuasion he had finally accepted the Federal Government as a tenant (R. 98). On the other hand, Quirk claims that he informed the petitioner on March 22, 1937, that the property was rented to the Government Printing Office (R. 99), fixing that date in his mind, because it happens to be the anniversary of the burial—*not the death*—of his brother (R. 193). Upon cross-examination on this point, it developed that the event which enabled Quirk to fix said date of March 22 occurred thirty-eight years ago (R. 193).

Upon request of the petitioner, which was granted by the trial court, the jury was instructed to apply to the above stated evidence the following rule with respect to the issue of procuring cause:

"You are instructed to find Mr. Whiteford the procuring cause for the lease between The Hecht Co. and the United States, if you find as a fact that by his acts and services in conformity with his contract of employment, Mr. Whiteford originated or set in motion, without break in their continuity, direct negotiations between The Hecht Co. and the United States Government which resulted in, or produced, the entry into the lease agreement between The Hecht Co. as owner and the United States as tenant." (R. 172).

The jury rendered its verdict in favor of the petitioner (R. 180), and the respondent filed its motion for judgment notwithstanding the verdict, or, in the alternative, to set aside the verdict and for a new trial (R. 181). The motions

were denied (R. 182-184), and the respondent filed its Notice of Appeal (R. 185).

**3. The reversal by two justices of the Court of Appeals, forming the majority, on the ground of insufficiency of evidence to find petitioner the procuring cause.**

On appeal before the United States Court of Appeals for the District of Columbia, the respondent presented to the appellate court the following five questions for decision (R. 204):

"1. Whether there was sufficient evidence to warrant a submission to the jury of the issue of whether the plaintiff was the procuring cause of the lease, so as to entitle him to a commission.

"2. Whether it is consistent with public policy to allow a broker a commission contingent upon his obtaining the entering into of a lease to the Government of the United States.

"3. Whether the statute of limitations is pleadable to an amended declaration which changes the plaintiff's claim from reliance on an express, to reliance on an implied contract.

"4. Whether it is error for the trial court to refuse to read instructions to the jury which have been granted by the court and which have been read to the jury by counsel in the course of his closing argument.

"5. Whether the trial court erred in excluding certain proffered testimony."

With regard to these five questions the dissenting justice correctly stated as follows:

"The majority opinion answers question number one in the negative; discusses, without deciding, question number two; ignores questions three, four and five; and discusses a collateral question that was not raised by the appellant either in the trial court or on this appeal regarding the sufficiency of the evidence to

support the amount of the commission found by the jury" (R. 205).

The judgment of the District Court, based on the verdict of the jury, was reversed by the majority of the appellate court "on the ground that the evidence is not sufficient for the jury to find that appellee, Whiteford, was the procuring cause of the lease" (R. 204). With regard to petitioner's visit to the Office of Space Control in February, 1936, and the inspection of the property by McAllister and the petitioner in April, 1936, the majority concluded that "there was no evidence that either of these episodes had anything to do with bringing about the lease that was ultimately signed" (R. 203). Final reliance, however, is placed by the majority upon "what they say is the positive testimony of the Space Control staff that Whiteford had no part in the chain of causation which resulted in the lease to the Government Printing Office" (R. 203, 206). The dissenting justice, referring to this "final reliance" of the majority upon the allegedly "positive" testimony of the staff of Space Control—as compared with the evidence submitted by the petitioner in order to show that it definitely permitted an inference of the petitioner having originated or set in motion, without break in their continuity, direct negotiations between the respondent and the United States Government which resulted in, or produced, the entry into the lease agreement, and that such inference was not mere speculation but was within the realm of reasonably deducible fact—commented as follows:

*"Quite evidently, therefore, the Space Control staff did not 'positively testify' that Whiteford had no part in the 'chain of causation' as assumed by the majority."* (R. 207). (Italics supplied)

In respect to the accuracy of the evidence stated by the petitioner the dissenting justice commented:

"I have carefully checked the summarized facts against the record which, I am convinced, amply supports them" (R. 207).

## B.

### REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A writ of certiorari should be granted under subdivision 5 (b) of Rule 38 of this Honorable Court for the following reasons :

1. The two justices of the United States Court of Appeals for the District of Columbia, forming the majority in the present case, in overruling the verdict of the jury, set themselves up as the triers of the facts superior to the jury of twelve men who heard the evidence and saw the witnesses, *thereby depriving the petitioner of the right of trial by jury on an issue of fact in violation of the Seventh Amendment of the Constitution of the United States.*

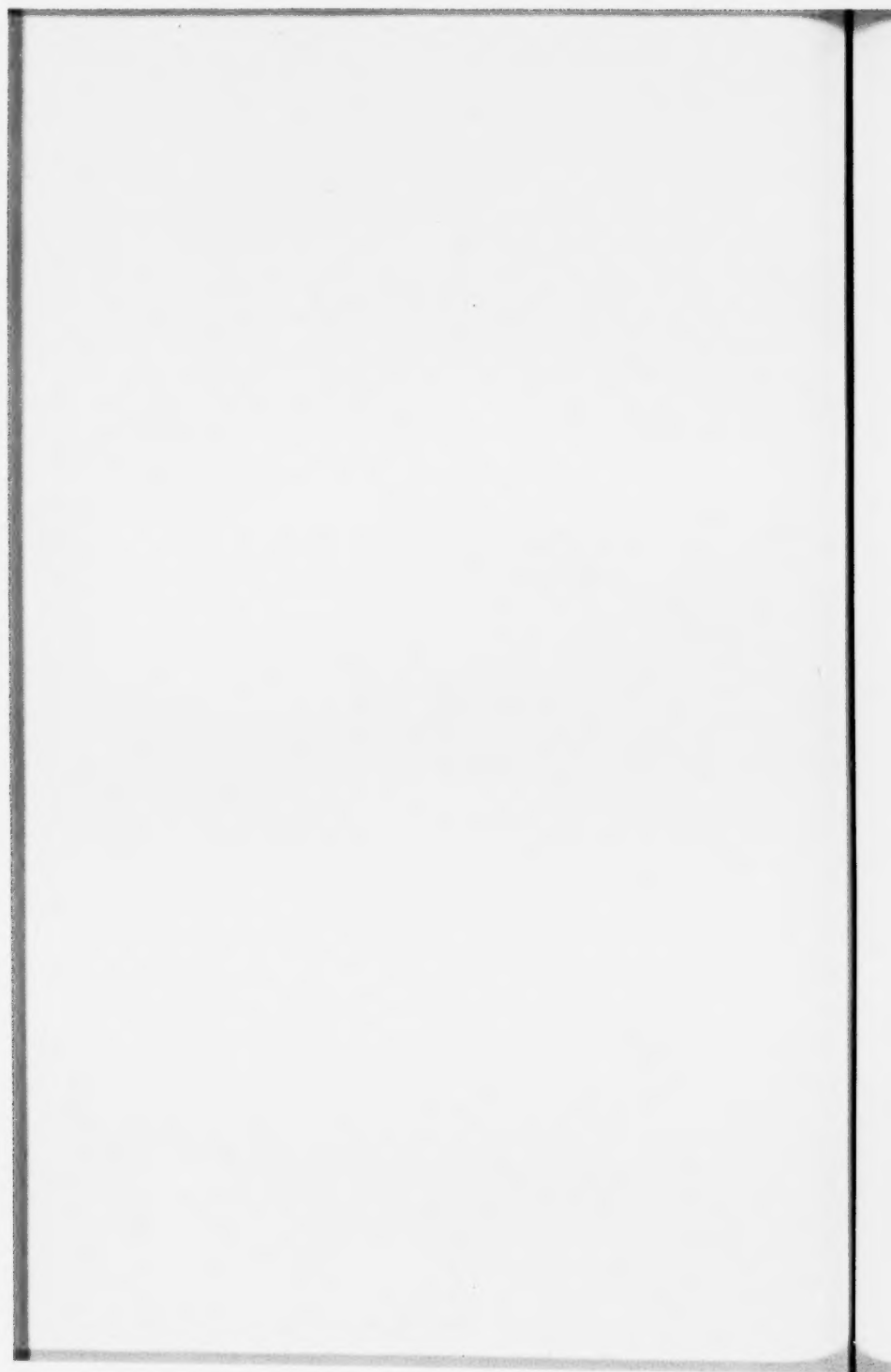
2. The decision of the two justices of the United States Court of Appeals for the District of Columbia, forming the majority in the present case, is in conflict with decisions of this Honorable Court and of their own appellate court to the effect that a motion for judgment notwithstanding the verdict, or to set aside the verdict, should be granted only *when but one reasonable view can be taken of the evidence and its every intendment, and that view is utterly opposed to the plaintiff's right to recover.*

3. The decision of the two justices of the United States Court of Appeals, forming the majority in the present case, is in conflict with decisions of this Honorable Court and of their own appellate court which hold that on a motion for peremptory instruction, or for judgment *non obstante veredicto*, the evidence must be construed most favorably to the party opposing such motion.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of, and under the seal of, this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, to the end that the decision of the United States Court of Appeals for the District of Columbia, rendered in the case numbered and entitled on its Docket No. 8246, The Hecht Company, a corporation, *Appellant*, v. Guy Whiteford, *Appellee*, be reviewed and determined by this Honorable Court; and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JAMES C. WILKES,  
JAMES E. ARTIS,  
WALTER R. SCHOENBERG,  
*Counsel for Petitioner,*





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**Supreme Court of the United States**

OCTOBER TERM, 1943.

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NO. ....

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GUY WHITEFORD, *Petitioner*,

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THE HECHT COMPANY, a corporation, *Respondent*.

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI.**

**I.**

**OPINIONS BELOW.**

The Justice of the District Court of the United States for the District of Columbia rendered an opinion refusing to set aside the verdict of the jury and to enter judgment for respondent *non obstante veredicto*. This opinion is set forth in the record at pages 182 to 184. The majority and minority opinions of the United States Court of Appeals for the District of Columbia have not yet been reported. They were delivered on August 16, 1943, and will be found on pages 201 to 212 of the record. The docket number of this case in the United States Court of Appeals for the District of Columbia is 8246.

**II.****JURISDICTION.**

The judgment of the United States Court of Appeals for the District of Columbia was entered August 16, 1943, and Petition for Rehearing denied on September 13, 1943 (R. 217).

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. Sec. 348 (a)), and by virtue of alleged violation of the Seventh Amendment of the Constitution.

**III.****STATEMENT OF THE CASE.**

A full statement of the case has been given under heading "A" of the Petition for Writ of Certiorari filed herewith, and, in the interest of brevity, is not repeated here.

**IV.****SPECIFICATION OF ERRORS.**

The two justices of the United States Court of Appeals for the District of Columbia, forming the majority in the present case, erred:

1. In reversing the decision of the District Court of the United States for the District of Columbia by substituting their own inferences from the evidence of record for the conclusions of the jury, contrary to the letter and spirit of the Seventh Amendment of the Constitution; and

2. In disregarding the rule of law firmly established by this Honorable Court and by their own appellate court to the effect that on a motion for a directed verdict, or for judgment *non obstante veredicto*, the evidence must be construed most favorably to the plaintiff; that to this end

the plaintiff is entitled to the full effect of every legitimate inference therefrom and, if, upon the evidence so considered, fair-minded men might reasonably draw different conclusions, the reviewing court will not substitute its judgment for that of the jury.

## V.

### THE QUESTION INVOLVED.

The question involved is:

Is the evidence, as shown by the record, of a nature that fair-minded men might reasonably draw different conclusions as to the fact whether the petitioner was the procuring cause of the lease agreement between the respondent and the Federal Government, or is it of a nature that no reasonable man could reach a verdict in favor of the petitioner?

## VI.

### ARGUMENT.

#### A.

The two justices of the Court of Appeals, forming the majority, in reversing the judgment of the trial court refusing to set aside the verdict of the jury, have usurped the function of the jury.

This Honorable Court, in *Berry v. United States*, 312 U. S. 450, 85 L. Ed. 945, decided March 3, 1941, granted a writ of certiorari to determine whether or not the evidence in that case justified a directed verdict. There the jury found the petitioner was totally disabled and the Government appealed. The Circuit Court of Appeals for the Second Circuit held that the plaintiff had not produced sufficient evidence to justify the submission of the case to the jury. After the writ of certiorari was granted and upon consideration of the evidence, this Court reversed the appellate court on the ground that there was sufficient evidence

to sustain the jury's verdict, and, discussing Rule 50 (b) of the Federal Rules of Civil Procedure, authorizing district judges, under certain circumstances, to enter a judgment contrary to the jury's verdict, without granting a new trial, Mr. Justice Black, delivering the opinion of the Court, stated as follows:

"But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts \* \* \*" (Italics supplied)

In a later case of this Court, on the same issue, decided March 30, 1942 (*Jacob v. City of New York*, 315 U. S. 752, 86 L. Ed. 1166), Mr. Justice Murphy, in delivering the opinion of this Court, stated:

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." (Italics supplied)

In the very recent decision of this Court in *Galloway v. United States*, decided May 24, 1943, Adv. Opinions 87 L. Ed. 1042, Mr. Justice Rutledge, in discussing the various standards of proof which judges have required for submission to the jury and having in mind the lack of proof, in this particular case, of uninterrupted continuity of total disability for such period of time as, by the nature of the claim there involved, it was the burden of the plaintiff to sustain, stated as follows:

"Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed

to do duty for probative facts, *after making due allowance for all reasonably possible inferences favoring the party whose case is attacked* \* \* \*.

*“That guaranty (the Seventh Amendment) requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them.”* (Italics supplied)

Counsel for the petitioner submit that the above expressed rule has long been well established in the District of Columbia by the following cases:

*Baltimore & Potomac R. Co. v. Carrington*, 3 App. D. C. 101, 108.

“The right to have the facts determined by the jury ceases only when but one reasonable view can be taken of the evidence and of its every intendment, and that view is utterly opposed to the plaintiff’s right to recover.”

*Warthen v. Hammond*, 5 App. D. C. 167, 173.

“For it is not only the right, but often the duty, of a trial court, in the interests of justice, to vacate a verdict when the court is satisfied that the preponderance of evidence is against the verdict; and its action in such regard is matter of sound discretion, not to be revised on appeal by a purely appellate tribunal. And yet, though the trial court may, and often should, set aside a verdict on the ground of the preponderance of evidence being against it, and again remit the issue to a jury, it is not for that reason authorized in the first instance to direct a verdict for the party in whose favor it regards the evidence as preponderating. Where there is testimony of a substantial character to go to the jury, it is always for the jury to determine the question of the preponderance of evidence, subject to the revisory power of the court to order a retrial.”

*Adams v. Washington & Georgetown R. Co.*, 9 App. D. C. 26, 30.

“The provinces of the court and jury in the Federal judiciary system are separate and distinct, and the line

of division between them must be carefully observed. The ascertainment of this boundary is often a matter of difficulty in a particular case, and when the difficulty arises doubts should be resolved in favor of trial by jury, which is the constitutional right of every suitor in the courts of common law.

"It is the province of the jury to determine the credibility of the witnesses and the weight of the evidence under proper directions in respect to the principles of law applicable thereto. And the court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon. Stated in many different ways, this, we think, is substantially the doctrine of the adjudged cases that control in this jurisdiction. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Randall v. B. & O. R. R.*, 109 U. S. 478; *G. T. R. Co. v. Ives*, 144 U. S. 408, 417; *Railroad Co. v. Powers*, 149 U. S. 43; *Gardner v. Railroad Co.*, 150 U. S. 349; *Chicago, etc. R. R. Co. v. Lowell*, 151 U. S. 209, 217; *B. & P. R. R. Co. v. Carrington*, 3 App. D. C. 101, 109; *W. Gas L. Co. v. Poore*, 3 App. D. C. 127, 137; *Met. R. R. Co. v. Snashall*, 3 App. D. C. 420, 431; *Weaver v. B. & O. R. R. Co.*, 3 App. D. C. 436, 451; *Warthen v. Hammond*, 5 App. D. C. 167; *Met. R. R. Co. v. Falvey*, 5 App. D. C. 176; *B. & P. R. R. Co. v. Webster*, 6 App. D. C. 182; *D. C. v. Boswell*, 6 App. D. C. 402; *W. & G. R. R. Co. v. Wright*, 7 App. D. C. 295."

*Glaria v. Washington Southern R. Co.*, 30 App. D. C. 559, 563.

"A motion to direct a verdict is an admission of every fact in evidence, and of every inference reasonably deductible therefrom. And the motion can be granted only when but one reasonable view can be taken of the evidence and the conclusions therefrom, and that view is utterly opposed to the plaintiff's right to recover in the case."

*Catholic University of America v. Waggaman*, 32 App. D. C. 307, 320.

“The courts of review in this country are applying with increasing strictness the rules limiting the right of the trial judge to invade the province of the jury \* \* \*. The rule more generally followed is that ‘it is only where all reasonable men can draw but one inference from the undisputed facts that the question to be determined is one of law for the court’ ”.

It is respectfully submitted that, judged by these standards, the refusal of the trial court in the case at bar to direct, or to set aside, the verdict was right. There was substantial evidence in support of petitioner’s claim, permitting the inference on the part of the jury that the petitioner originated or set in motion, without break in their continuity, direct negotiations between The Hecht Company and the United States Government which resulted in, or produced, the entry into the lease agreement—although there may have been “evidence from which a jury could have reached a contrary conclusion” (*Berry v. United States, supra*). If the evidence as stated in the foregoing petition (p. 1-11), or as quoted in the dissenting opinion (R. 207) “be accepted as true, together with the reasonable inferences deducible from it, it would be clearly wrong to say that all reasonable men could draw but one conclusion from it and that conclusion utterly opposed to the plaintiff’s right to recover” (*Gunning v. Cooley*, 58 App. D. C. 304, 308, affirmed by this Court in 281 U. S. 90).

Counsel for petitioner respectfully submit that the preservation of the principle involved, namely, that an appellate court should not substitute its own opinion for that of the jury, as a living and subsisting principle of our administration of justice is of a magnitude greater than merely to compel the registering of a nostalgic regret about the passing away of a judicial tradition in the District of Columbia. Having recognized the salutary wisdom of this principle as one which distinguishes our judicial system from deci-

sions of a Court of Star Chamber, counsel for the petitioner object most emphatically to the relegating of this axiomatic principle by the majority of the court below to the obscure position of the folklore of the law, so to speak, within which the right of trial by jury survives merely as a cherished illusion in the beliefs and traditions of the common people. They feel supported and encouraged in their stand against the derogation of this principle by numerous unsolicited expressions of amazement and concern over the majority opinion in this case, received from members of the bar, and they respectfully call to the attention of this Court an article of Mark DeWolfe Howe which appeared in 52 Harv. L. R. 582: "Juries as Judges of Criminal Law". Although dealing mainly with juries in criminal cases, the following language applies with equal force to civil actions:

"Many will feel, no doubt, that the democratic thesis that juries are competent to decide questions of criminal law was naive and mistaken in the extreme. Even if that be so, the story does not lose its importance. We have seen how readily the courts themselves adopted the thesis in our earlier years when judges, even, were occasionally naive. The democratic demand that the people themselves partake in the process of interpreting the law was so ardently made that many courts were unwilling to deny it. After the judges had satisfied this demand, and despite its constant repetition, they regretted their own early tolerance, condemned the legislative interference with judicial processes, and by various means reversed their prior holdings.

\* \* \* \* \*

"The court which had once found the jury's right to be 'a true principle of the common law', 'a great landmark of liberty' which is 'peculiarly appropriate to a free government' could later find that right to be 'contrary to the fundamental maxims of the common law' and unconstitutional. Such a reversal of opinion, if it were isolated, might have little significance, but when many courts throughout the country are found to be making the same shift and to be doing so despite the

provisions of statutes and constitutions, there is revealed one aspect of that basic conflict in the legal history of America—the *conflict between the people's aspiration for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges.*" (Italics supplied.)

Who shall prevail?

### B.

The two justices of the Court of Appeals, forming the majority, have disregarded the well established rule that on a motion for peremptory instruction the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.

This Court stated in *Chesapeake & Ohio Railway Company v. Martin and Porter*, 283 U. S. 209, 75 L. Ed. 983, as follows:

"A demurrer to the evidence must be tested by the same rules that apply in respect to a motion to direct a verdict. *Schuchardt v. Allens*, 1 Wall. 359, 369, 370, 17 L. Ed. 642, 646; *Merrick v. Giddings*, 115 U. S. 300, 305, 29 L. Ed. 403, 405, 6 S. Ct. 65. In ruling upon either, *the court must resolve all conflicts in the evidence against the defendant*; but is bound to sustain the demurrer or grant the motion, as the case may be, whenever the facts established and the conclusions which they reasonably justify are *legally* insufficient to serve as the foundation for a verdict in favor of the plaintiff." (Italics supplied)

A year earlier, in 1930, this Court had held in *Gunning v. Cooley*, 281 U. S. 90, 74 L. Ed. 720, Mr. Justice Butler speaking for the Court, as follows:

"And in determining a motion of either party for a peremptory instruction, *the court assumes that the evi-*

*dence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."* (Italics supplied)

Within the jurisdiction of the District of Columbia this rule has, heretofore, consistently been adhered to by the court below. Its most known expression is found in *Jackson v. Capital Transit Co.*, 69 App. D. C. 147, 99 Fed. (2nd) 380, where the court below stated as follows:

"However, on a motion for a directed verdict, it is well settled that *the evidence must be construed most favorably to the plaintiff; to this end he is entitled to the full effect of every legitimate inference therefrom. If upon the evidence, so considered, reasonable men might differ, the case should go to the jury; if, on the other hand, no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted.* A mere scintilla of evidence is not sufficient for this purpose, however. The question is not whether there is any evidence 'but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed'. *Pleasants v. Fant*, 22 Wall. (U. S.) 116, 121, 22 L. Ed. 780". (Italics supplied)

To the same effect:

*Hopkins v. Baltimore & Ohio R. Co.*, 65 App. D. C. 167, 81 Fed. (2nd) 894.

*Schwartzman v. Lloyd*, 65 App. D. C. 216, 82 Fed. (2nd) 822.

*Speirs v. District of Columbia*, 66 App. D. C. 194, 85 Fed. (2nd) 693.

*S. S. Kresge Co. v. Kenney*, 66 App. D. C. 274, 86 Fed. (2nd) 651.

*Fleming v. Fisk*, 66 App. D. C. 350, 87 Fed. (2nd) 747.

*Walford v. McNeil*, 69 App. D. C. 247, 100 Fed. (2nd) 112.

*Tobin v. Pennsylvania R. Co.*, 69 App. D. C. 262, 100 Fed. (2nd) 435, certiorari denied, 59 S. Ct. 488, 306 U. S. 640, 83 L. Ed. 1040.

### C.

The inference drawn from the evidence that petitioner was the procuring cause is within the realm of reasonably deducible fact and not mere speculation.

It is respectfully submitted that the evidence as outlined on pages 1-11 of the Petition for Writ of Certiorari, represents "more than a mere scintilla" (*Gunning v. Cooley, supra*). The following events, and conclusions reasonably to be drawn therefrom, definitely permit as a reasonable inference that the petitioner, contrary to the majority opinion (R. 203), had a "part in the chain of causation which resulted in the lease to the Federal Government":

The submission of respondent's property to Guthridge in February, 1936 (R. 14, 15), which the latter recalled, except the date thereof (R. 151); the inspection of the property around the middle of April, 1936, by McAllister (R. 55); the discussion of the property between Guthridge and McAllister at that time (R. 132, 135); the testimony that this discussion was "among the sources" of information which Guthridge had of the property, leading to the compelling conclusion, since no other submission by other brokers had occurred prior thereto (R. 150, 130), and since Guthridge remembered the availability of the property without consulting later written submissions thereof (R. 132, 133), that this "source" must, of necessity, have been the first *causa causans*; the frustration of petitioner's efforts by respondent's consistent and categorical denial of its consent to a tenancy by the Federal Government, while—leaving the petitioner in ignorance thereof—direct negotiations were had by the respondent with the Federal Government (R. 103, 34, 104, 105, 39, 70, 99); the final cli-

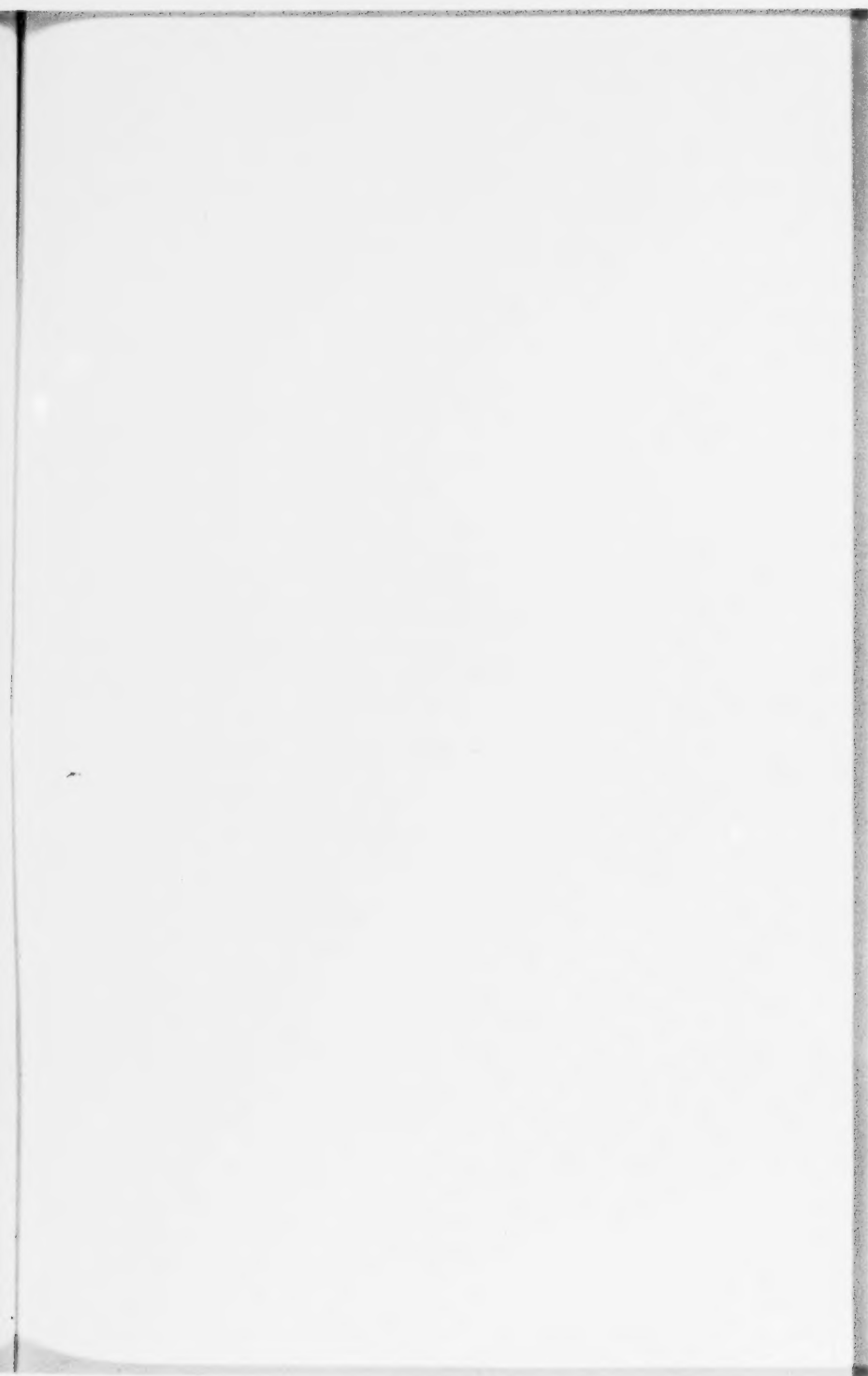
mactic statement by Quirk to the effect that the petitioner ultimately had convinced the respondent "that it was the best thing to do" (R. 70), which statement would seem to be an adequate, and very plausible, expression of what Quirk testified was the cause of his change of mind with respect to a Government tenancy, to wit, "it was the best we could do with it" (R. 97-98).

## VII.

### CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision of the United States Court of Appeals for the District of Columbia be reversed and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

JAMES C. WILKES,  
JAMES E. ARTIS,  
WALTER R. SCHOENBERG,  
*Counsel for Petitioner.*



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BEFORE THE  
**Supreme Court of the United States**

OCTOBER TERM, 1943.

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NO. ....

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GUY WHITEFORD, *Petitioner*,

v.

THE HECHT COMPANY, a corporation, *Respondent*.

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**MOTION AS TO RECORD.**

*To the Honorable, the Chief Justice and Associate Justices:*

Petitioner moves that his Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia may be considered upon the Appendices to the Briefs of the parties filed in this cause in said Court of Appeals, and upon the Proceedings and Opinions in that Court, and for reasons therefor respectfully shows:

1. The Appendices to said Briefs carry all pertinent facts and prior proceedings (R. 1-9; 167-185; 197-218).
2. The Minority Opinion of the Court of Appeals sets forth pertinent facts with completeness and accuracy (R. 204 ff).
3. On October 19, 1943, petitioner filed Designation of Record in the Court of Appeals (R. 217), designating, for

use as record in connection with this Petition for Writ of Certiorari, said Appendices and the Proceedings and Majority and Minority Opinions in that Court, serving a copy of such Designation upon respondent (R. 218). The latter filed no Counter-Designation, nor did it object otherwise.

4. Despite oral request by petitioner's counsel, respondent now refuses to stipulate that this Petition may be considered upon said Appendices and Proceedings and Opinions in the Court of Appeals.

5. Certified copy of said Appendices, and of said Proceedings and Opinions, have been lodged with the Clerk of this Court, along with ten plain copies of said Appendices and said Opinions.

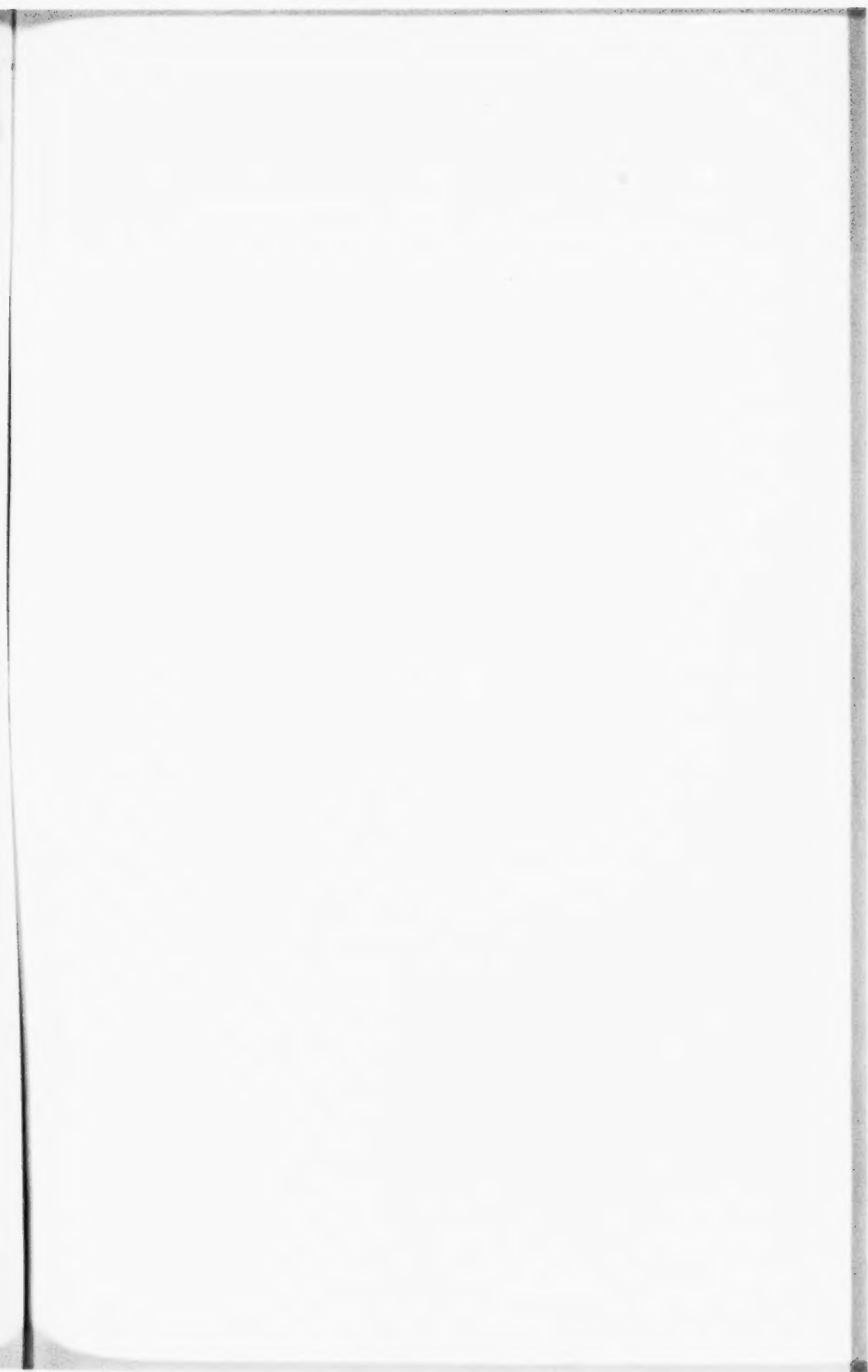
6. No reference is made in this Petition to any portion of the record not contained in said Appendices or in said Proceedings and Opinions.

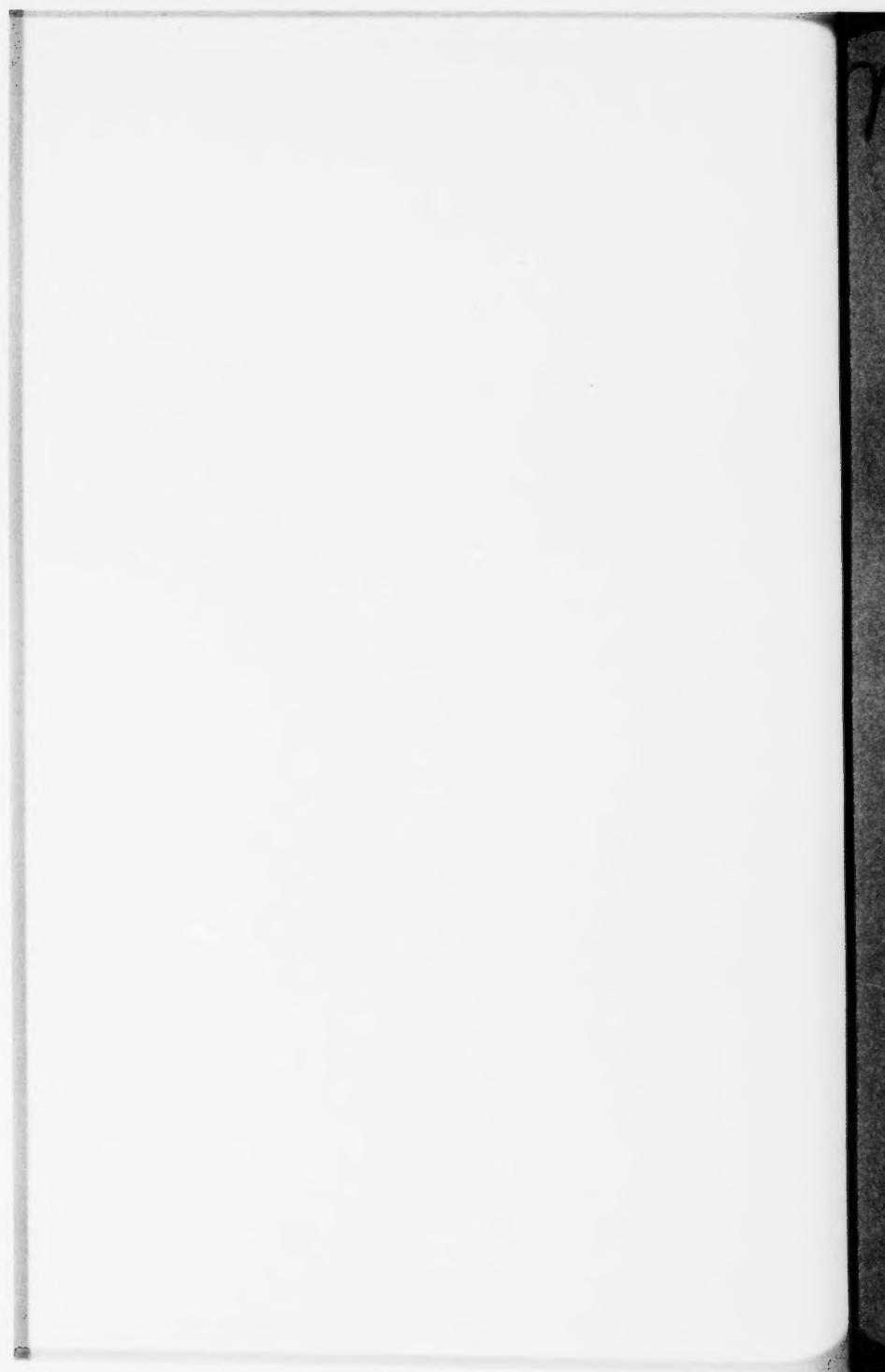
7. The original record in the Court of Appeals has also been lodged with the Clerk of the Court.

8. If the Writ of Certiorari prayed for in the Petition is granted, petitioner will promptly supply the requisite additional printed copies of said Appendices and of said Proceedings and Opinions; or, if so required by this Court, will promptly supply the requisite number of printed copies of further portions of the record in the Court of Appeals.

Respectfully submitted,

JAMES C. WILKES,  
JAMES E. ARTIS,  
WALTER R. SCHOENBERG,  
*Counsel for Petitioner,*  
Tower Building,  
Washington 5, D. C.





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**Supreme Court of the United States**

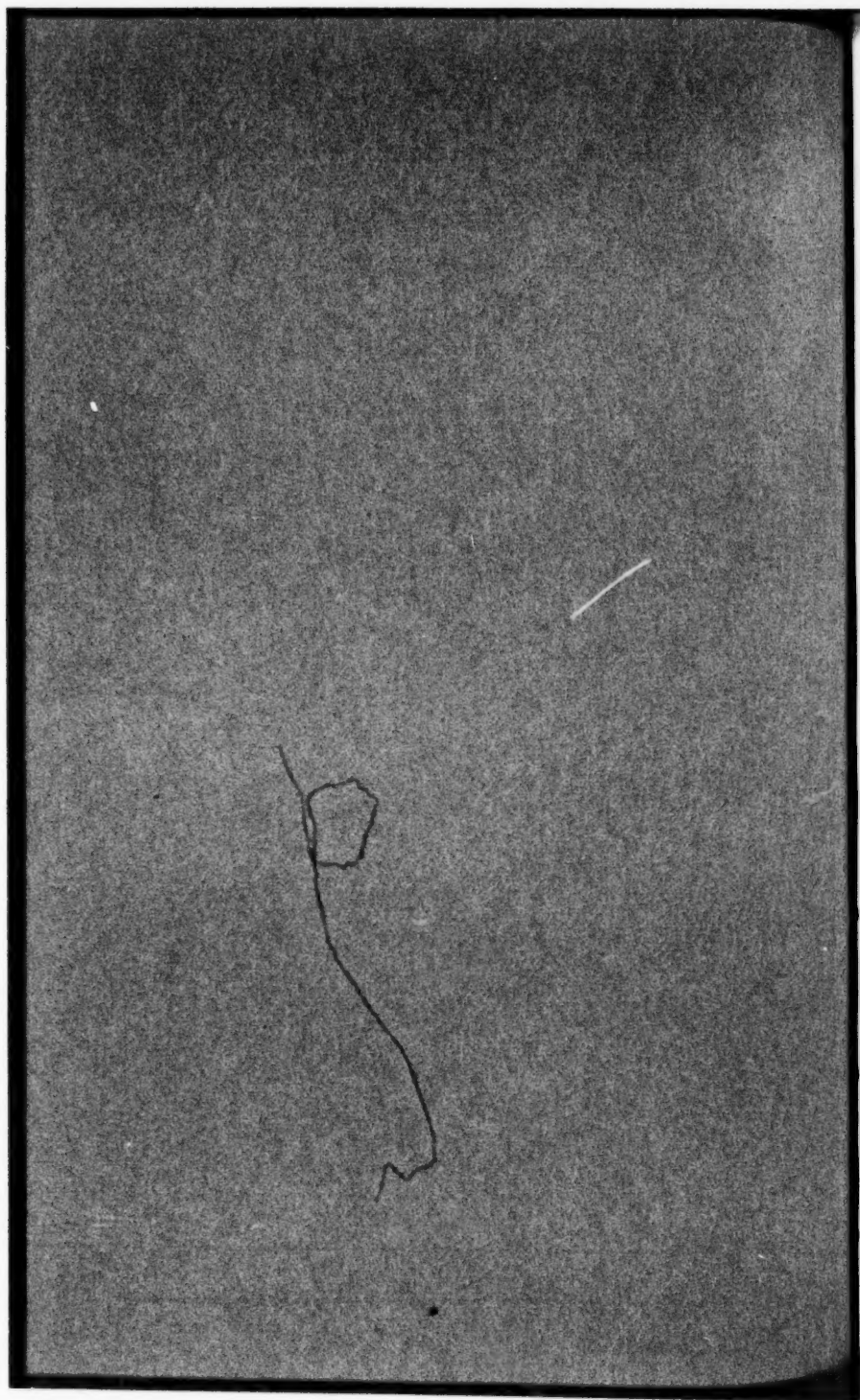
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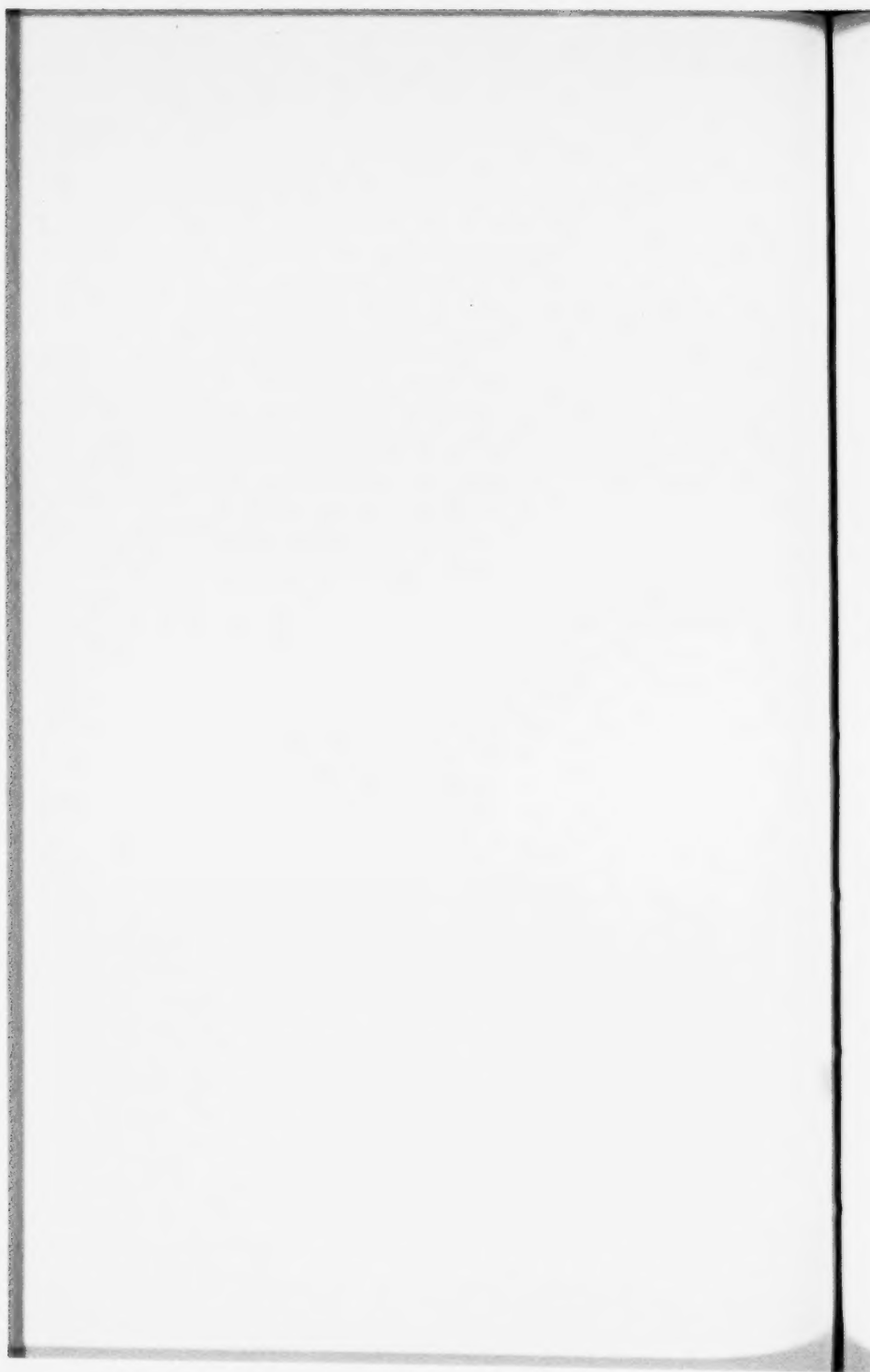
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1943.

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No. 485.

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GUY WHITEFORD, *Petitioner*,

v.

THE HECHT COMPANY, a corporation, *Respondent*.

---

**BRIEF IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI.**

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**I.**

**STATEMENT OF THE CASE.**

The petitioner, in his statement of the case, has emphasized certain disputed questions of fact (*e. g.*, pp. 4, 6), thus endeavoring to give color to his contention (p. 14) that the Court of Appeals weighed the evidence and reversed the judgment of the District Court because it disagreed with the conclusion reached by the jury. This is not the case. The judgment of the Court of Appeals is correct upon the basis of resolving all disputed evidence in favor of petitioner, as will be seen by the following statement of facts,

in which we have assumed, in all cases of disputes, that the testimony given by or on behalf of petitioner was true.

*The unsuccessful activities of petitioner.*

Respondent, the operator of a department store, owned a warehouse in the District of Columbia known as 613-621 G Street, Northwest (R. 10, 11). On February 10, 1936, George M. Quirk, respondent's assistant secretary and store manager, in a letter to petitioner, requested him to "prepare plans for the disposing of the G Street warehouse," which, he stated, respondent would vacate around October 1 [1936], (R. 88, 10).

Between February 15 and February 17, petitioner, in response to that letter, went to Quirk's office in respondent's store. While he was there, Quirk told him that respondent would have no use for the G Street warehouse upon the completion of a new warehouse, then in contemplation, and that it preferred to sell the G Street warehouse. Petitioner told Quirk that his "best bet" was to lease the building, and that he thought the building should be leased to the United States Government, but Quirk said that he did not like the Government as a tenant because the Government made short-term leases and leases for longer periods were contingent upon the appropriation of money to pay the rent (R. 12-13).

Petitioner told Quirk that he would interest himself in the property. Quirk told petitioner to quote \$450,000 as the sale price of the property. Petitioner then asked him, "How about the rental?" and Quirk replied that respondent would want a rental of \$50,000 (R. 13-14). Immediately upon the conclusion of the conference petitioner went to the office of Clay J. Guthridge, Chief of the Division of Space Control, a division of the National Park Service, which, in turn, was a part of the Department of the Interior (R. 14-15, 125). This Division had control of the assignment of space for the use of the Federal Government, under the provisions of 40 U. S. C., Sec. 289. It was the prac-

tice of the owners of real estate or real-estate agents who had property to list, to communicate that fact to Guthridge or someone on his staff. If Guthridge or a member of his staff considered the matter worthy of pursuing further at that time, he would ask for the submission of a proposal; if it was a building for which the Government had no immediate need, or if it did not appear that negotiations could be concluded, he would ask that the building be listed with the Division and it was put on file and a record was made of that building having been listed with the Division (R. 126, 85).

Petitioner told Guthridge on the occasion of this visit to him that the warehouse would be vacated around October 1, [1936] (R. 14-15). Guthridge did not want the plans of the building because of its unavailability for six or seven months (R. 51, 53-54). Petitioner did not give Guthridge any details in regard to the building. He had not himself been in the building since 1921 (R. 68-69). He did not know the area or the amount of rentable space that it contained, nor did he know the assessed value of the property (R. 48-50, 54). The assessed value was a material factor in the fixing of rentals, as hereinafter more fully appears (*infra*, pp. 4-5). The question of the amount of rental was not discussed at all at the conference between petitioner and Guthridge, and the record does not indicate that petitioner did more than mention the building and advise Guthridge that it would not be available before October 1.

Petitioner had no records in his file which supported his statement that he had had this conference with Guthridge (R. 62). Guthridge testified that petitioner had been in to talk to him about the property, but he was unable to say when that was (R. 131). No record of any listing of the property by petitioner was ever made in the Division of Space Control (R. 128, 151).

Petitioner had no further dealings with any representative of the United States in respect of this property until about the middle of April, 1936, at which time, by appoint-

ment, he met Ralph E. McAllister, an employee of the Division of Space Control, at Eighteenth and G Streets (R. 17, 71). McAllister was assistant to Guthridge and it was his duty to find out about individual buildings (R. 75-76). On the occasion referred to, petitioner showed McAllister a building near Eighteenth and H Streets, and then a building at Seventh Street and New York Avenue. McAllister did not think either of these buildings met the Government's requirements (R. 17-18, 71). They then went to respondent's warehouse. They entered the first floor, but they saw only part of that floor, and none of the upper floors (R. 18, 71). As the building was not to be available until October 1, their examination was "just casual," and they left that building and went to another building on Fourteenth Street (R. 71-72). McAllister was unable to state whether he ever made an oral report to anyone in the Division of Space Control as to his visit to the warehouse (R. 76). He was sure that he had never made any official report thereof in writing (R. 77-78). It was no part of McAllister's duties to conduct negotiations in regard to leases (R. 75-76).

A few days prior to August 28, 1936, petitioner erected a sign on the building and about September 1, one Carl Rosinski, a real estate broker specializing in the leasing of business property (R. 79), telephoned petitioner, said he had seen his sign, inquired as to the rental being asked for the property and asked petitioner whether he would cooperate with him if the latter could secure a tenant (R. 20). Pursuant to permission obtained by petitioner from Quirk, petitioner called Rosinski in to assist him (R. 20).

On or about September 21, 1936, in the course of a conference between petitioner and Quirk at the latter's office, petitioner told Quirk that he had been informed by Rosinski that the Social Security Board had indicated that it would pay 38,000 plus dollars for the property as annual rental, that being as much as the Government would be allowed to pay for the property "under the law" (R. 22).

The law referred to was 40 U. S. C., Sec. 40(a), which prohibited the payment of rentals by the Federal Government of more than 15 percentum of the fair market value of the premises, or more than 25 percentum of the amount of rent for the first year of the rental term, for alterations, improvements and repairs of the rented premises. Rentals in the District of Columbia were subject to a ruling of the Comptroller General that the value fixed by the Assessor of the District of Columbia for taxation must be held to be the fair market value within the meaning of this statute (16 Comp. Gen. 967). The assessed value of the property was \$256,346 (R. 52).

Quirk told petitioner that he wanted \$50,000 a year rental and that was final (R. 22-23).

Thereafter, under date September 24 (R. 21) Rosinski addressed a letter to petitioner in which he stated that he had discussed the proposed leasing of the building at great length, with the following results: that the United States could not pay more than approximately \$38,000 per year; that the Government could spend an amount not exceeding 25 per cent of the yearly rental, or \$9,500, on alterations, and that in addition the Government could pay a further rental of 15 per cent of the cost of all alterations made by the owner of the property (R. 23-24).

Rosinski further stated in this letter that in order to make the building suitable for the needs of the Government it would be necessary for certain alterations and improvements detailed in the letter, to be made thereto (R. 23-24). These alterations and improvements would have cost approximately \$137,300 (R. 124-125).

Petitioner took the letter to Quirk's office and discussed it with him. Quirk stated that they would not accept a rental of \$38,000 plus (R. 24-25).

A few days thereafter, at the suggestion of Rosinski, who desired to submit the matter to Quirk from his, Rosinski's "angle", petitioner and Rosinski called on Quirk and endeavored to persuade Quirk to make a lease to the

Government on the terms suggested. Quirk, however, insisted that he would not lease the property for less than \$50,000, and the conference ended on that note (R. 25-26, 80-81). Furthermore, the requirements of the Social Security Board would not have been met by the warehouse, because the area thereof was insufficient (R. 82), and because the Society Security Board required possession by October 1 and it was apparent at the time of the conference, which took place in September, that possession could not be given by that date (R. 95-96).

On November 18, 1936, Rosinski wrote to Quirk that he had had a call that day from the Social Security Office in regard to the warehouse and that, while the bureau had taken space in Baltimore, there was the possibility that they could also use the warehouse, and Rosinski inquired whether Quirk was willing to deal as previously suggested (R. 26-27). Under date November 28, Quirk wrote to Rosinski that respondent would not be interested in leasing the warehouse in accordance with Rosinski's previous suggestion (R. 27).

Nothing further was done by petitioner or Rosinski so far as the United States as a tenant was concerned.

*The lease of the warehouse to the United States for use of Government Printing Office.*

Petitioner did not have an exclusive agency in respect of this property (R. 91, 97).

In April or May of 1936, Henry K. Jawish, another broker (R. 52), had brought the warehouse to the attention of Melvin C. Russell, who was the chief of the District of Columbia space control section of the Division of Space Control (R. 149-150), and later, on July 16, 1936, Jawish made a written listing of the property in the office of the Division of Space Control (R. 150, 52-53, 128-129). The Jawish listing was the earliest listing with any Government agency. In the fall of 1936, Russell, together with Jawish, inspected the property and the former made a report thereof to Guthridge (R. 151-152).

The property had also been listed with the Division of Space Control by another real estate broker, Frank J. Mulhern, on October 6, 1936 (R. 129-131).

Bedford S. Robertson, another real estate broker, had also submitted it to J. Reed Carpenter, Chief of the Space and Rental Section of the Social Security Board, in August or September of 1936, and it had been inspected on behalf of that Board by reason of such submission (R. 122, 136-137); and Robertson had gone through the building with Reed F. Martin, Chief Clerk of the General Accounting Office, with a view to the United States Government becoming a tenant thereof for the use of that Office (R. 159). Robertson had also submitted the building to the Treasury Department, Soil Conservation and the Government Printing Office (R. 122).

Respondent's new warehouse was completed on February 1, 1937 (R. 96). Respondent itself had been endeavoring to sell the G Street warehouse or to lease it to a private tenant (R. 15, 16, 29, 106-107), but neither a purchaser nor a tenant had been found (R. 97-98). At about that time, and shortly before February 3, 1937, Quirk discussed orally with Guthridge a possible renting of the warehouse to the United States (R. 131). This was followed by a letter from Quirk to Guthridge on February 3, 1937, in which he advised Guthridge that respondent would be ready to vacate the warehouse on February 20, and he requested Guthridge to communicate with him if any of the Federal Departments were interested (R. 27-28).

Quirk knew the procedure in regard to leases to the United States, because respondent had previously leased another property to it (R. 106, 164-165).

At about that time the Government Printing Office was in need of space for storage, and Alfred E. Hanson, Mechanical Superintendent of that Office, went to the Division of Space Control, and there told Guthridge and the latter's assistant, Russell, of his requirements.

Russell mentioned to Guthridge the fact that perhaps the respondent's warehouse would meet the requirements

of the Government Printing Office (R. 152), and a day or two thereafter Guthridge suggested the building to Hanson and told him to get in touch with Quirk in regard thereto (R. 153, 155). Hanson did get in touch with Quirk (R. 156) and after negotiations which lasted two or three months (R. 158) a lease was made to the United States for the use of the Government Printing Office (R. 131). The lease was dated June 1, 1937 and was at a rental of \$38,449.92 (R. 5, 39). The term was for the period begun June 1, 1937 and ended June 30, 1938, with renewal options on the part of the United States for further periods not extending beyond June 30, 1941. Respondent agreed to make certain alterations and improvements, for which the United States agreed to reimburse it in an amount not exceeding \$8,500 (R. 35). These improvements and alterations were made by respondent at a cost of \$10,431.87 (R. 100, 124). This was about \$127,000 less than what would have been the cost of the improvements and alterations which the Social Security Board desired (R. 124-125).

The United States remained in possession of the warehouse and paid rent therefor at the stipulated rental for the period from June, 1937 through March, 1940 (R. 3), the action having been filed April 12, 1940 (R. 1).

No submission of this warehouse by either petitioner or Rosinski was in any manner the cause of Hanson's attention being directed to the warehouse, or of the negotiations and lease which ensued. Russell knew of the warehouse because he had inspected it with Jawish (*ante*, p. 6) and not by reason of anything that petitioner or Rosinski had ever done (R. 151) and Guthridge's getting in contact with Quirk was due to the fact that Jawish had listed the property in July, 1936, and not by reason of anything done by petitioner or Rosinski (R. 128).

As to this, Russell testified as follows:

“Q. And what caused you to know about the G Street building when you directed that to the attention of Mr. Guthridge?

“A. The fact that I had visited the building, was familiar with it, on my visit with Mr. Jawish.

“Q. Did the fact that Mr. Whiteford or Mr. Rosinski had ever been in the office have any bearing on your knowing about that building?

“A. No, none whatsoever.” (R. 152.)

Guthridge testified on this point as follows:

“Q. Did any listing or any record cause you to call Mr. Quirk?

“A. Yes.

“Q. Will you please tell us whose listing or record caused you to do that?

“A. Mr. Jawish had made a listing back in July.

“Q. Did you get in touch with Mr. Quirk to inquire of him as to whether or not the space might be available by reason of anything that Mr. Whiteford or Mr. Rosinski did?

“A. Not to my recollection, no. (R. 128)

## II.

### REASONS RELIED ON FOR THE DENIAL OF THE WRIT.

1. The case is not one of sufficient importance either to the litigants or to the public to justify the granting of the writ.

2. The case does not involve the construction of any statute or legal principle of general application, and does not involve a real question under the Constitution.

3. The judgment of the United States Court of Appeals for the District of Columbia is plainly right.

## III.

### SUMMARY OF THE ARGUMENT.

A real estate agent or broker is not entitled to a commission for obtaining a lease unless his activities in connection therewith were the procuring cause of such lease;

and where there is no evidence from which it could reasonably be found that the agent or broker was the procuring cause, there is no issue justifying submission to a jury.

#### IV.

#### ARGUMENT.

The general principle as to when a real estate broker is entitled to a commission is well settled in the District of Columbia. As stated by the Court of Appeals of the District of Columbia in *Shoemaker v. Digges*, 46 App. D. C. 206, 214, the broker is entitled to a commission if he finds a customer with whom the owner closes the deal and if he is the real procurer thereof.

It is respectfully submitted that on the facts of this case neither petitioner nor Rosinski either found a tenant for the property or was the procurer of the lease.

The presence of various departments and agencies of the Government of the United States in the District of Columbia was of course well known to respondent as well as to all other persons. Equally as well known by reason of its notoriety, was the fact that the United States is and always has been a potential lessee of large properties, particularly during 1936 and 1937, which were periods of great expansion of Governmental activities. As an example, the Social Security Board was at the time, to use the language of one of its officers, "frantic for space" (R. 138). Furthermore, respondent had on a previous occasion leased other property to the United States (R. 108, 164-165). It cannot be successfully contended that any person, real estate broker or otherwise, is entitled to compensation for introducing a property owner to his Government, particularly when the Government is seeking space and maintaining an agency for that purpose.

Coming then to a consideration of the question of whether petitioner or Rosinski stimulated or procured the execution of the lease, we find it summary:

About the middle of February, 1936, petitioner went to the Chief of the Division of Space Control. Apparently he did no more than mention the fact that the property would be available about October 1. Guthridge was not interested in property so remote as to time of availability. There was no discussion between petitioner and Guthridge as to the character of the building, its area, its assessed value or the rental that would be demanded for it or that could be paid for it. No written record of any kind was either submitted by petitioner or made by the Division of Space Control.

In April, 1936, petitioner took to the building Ralph E. McAllister, an employee of the Division of Space Control, whose duty it was to find out about individual buildings, but who had no authority to negotiate in regard to leases. McAllister and petitioner went to the warehouse, and made a casual inspection, viewing a part of the first floor and the outside of the building. McAllister did not care to make other than a casual inspection, because the building would not be available before October, and no record of his visit to the building was made in the office of the Division of Space Control. This was the end of petitioner's activities so far as the United States was concerned.

The activities of Rosinski in September, 1936, in connection with the Social Security Board may be entirely disregarded. In fact, a lease to that agency was no more than an idea of Rosinski's. The Social Security Board wanted space larger than respondent's warehouse, at a time when respondent's warehouse could not be delivered to it, and required repairs which would have cost \$137,300. Rosinski's activities led nowhere and could have led nowhere, and his energies were devoted principally to endeavoring to persuade Quirk to make such a lease (R. 59-60).

There is no pretense that petitioner or Rosinski were the only persons who had ever discussed the property with representatives of the United States. The property had been listed and exhibited by Jawish, Mulkern and Robert-

son, other real estate brokers, at various times. There was no evidence that the activities of petitioner or Rosinski stimulated the United States to become lessee of the warehouse; the uncontradicted evidence of Guthridge, Russell and Hanson, who handled the matter for the Government, was directly to the contrary (*ante*, pp. 8-9).

The question then is whether an agent is entitled to a commission for doing nothing except casually mentioning the property to one representative of the Government and casually exhibiting it to another, without any discussion of details or terms, when neither representative became interested in the property as a result of such mention or exhibit, made any record thereof, remembered it, or was in any manner influenced thereby. We respectfully and confidently submit that the answer to this question must be in the negative, as otherwise property owners would be subjected to claims by every agent who had at any time mentioned the property to a person who subsequently became a purchaser or lessee.

This case does not present the situation which sometimes occurs when an owner discharges the agent and then concludes a deal with a prospect stimulated to the purchase by the activities of the broker, upon terms no more favorable to the owner than those which could have been obtained by the agent. Neither petitioner nor Rosinski ever brought to respondent an offer from the Government. Although the petitioner, in paragraph 6 of his complaint (R. 2) claimed that he brought respondent a definite offer on the part of the Federal Government to lease the premises for occupancy by the Social Security Board, the testimony did not develop any such offer, but merely a statement by Rosinski that he thought he could interest the Social Security Board in the property.

When petitioner mentioned the warehouse to Guthridge in February, 1936, he knew that Quirk wanted a rental of \$50,000 per year (R. 13-14) and also knew or should have known that the United States under the statute (40 U. S. C.

Sec. 40-a) as construed by the Comptroller General, could not pay more than a little over \$38,000 per year. His attention of the property to Guthridge was necessarily barren of results, and could have been made for no other purpose than to establish a claim to commission in the event the property should ultimately be leased to the United States. The same is true of petitioner's visit to the property with McAllister in April, 1936. So far as Rosinski's activities are concerned, there were the additional factors that the Social Security Board wanted an office building, whereas respondent's building was a warehouse which had formerly been a garage, and which would have required an expenditure by respondent of \$137,300 in order to make it suitable for the needs of the Board; that its area was insufficient for the needs of the Board; and that the premises could not be delivered within the time within which the Board needed space. Petitioner's whole case, therefore, rests on his casual talk with Guthridge in February of 1936 and his casual inspection of the property with McAllister in April, 1936. For this he claims to be entitled to \$1,922.50.\* for each year that the United States occupies the warehouse under the 1937 lease and all renewals thereof and, presumably, 5 per cent of such rentals as may hereafter be paid by the United States under any future lease thereof.

The complaint (Par. 8, R. 2) is predicated upon the charge that petitioner had entered into an agreement with the respondent, and that while, pursuant to that agreement, he was urging respondent to accept an alleged offer on the part of the Federal Government to rent the premises, respondent went behind petitioner's back and consummated a rental agreement. During the trial, the Court permitted an amendment to the complaint, that amendment being limited to a shift from an action on special agreement to an action on implied promise to pay.

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\* 5% of \$38,499.92.

The Court held and charged the jury that the evidence offered by petitioner did not support his claim as outlined above, and stated *inter alia*:

"The evidence does not permit the petitioner to claim that he submitted an offer in the letter of Mr. Rosinski of September 24, 1936, and that this was rejected by the respondent, and that later the respondent went behind his back and consummated an agreement of the character suggested in Mr. Rosinski's letter, for the reason, among others, that the lease entered into on June 1st of the following year, while identical as to rental, was entirely different as to conditions in respect of changes in the building. But this evidence was received as a part of the showing of efforts on the part of the petitioner and as bearing on the principal point as to whether he was the procuring cause and whether or not there was any abandonment of his efforts as of September, 1936; and you will consider the evidence for those purposes." (R. 169.)

This conclusion reached by the trial Court points quite clearly to the correctness of our contention that the case should not have been submitted to the jury but that respondent was entitled to a directed verdict.

Petitioner cannot under any circumstances claim that he was an exclusive agent with reference to the handling of this property. Admittedly, petitioner made no written or official listing of the property in the Division of Space Control. On September 21, 1936, the basis upon which Rosinski thought the Social Security Board might become interested in the property was placed before respondent's representative, Quirk, who stated definitely he was not interested in it. Again, admittedly, Jawish the real-estate broker formally, and on an official form provided for that purpose, had listed the property with the Government in July, 1936 and in August or September, 1936, Robertson, also a real estate broker, did likewise, both brokers having it viewed by Government agents. Thus it cannot be denied that there was more than one real estate broker attempting to make some deal with reference to this property.

In the case of *Evans v. Shinn*, 400 App. D. C., 557, 562, the Court said:

“Petitioner was not the exclusive agent. He was operating in competition with other agents on equal footing with himself. \* \* \* The rule as to procuring cause is different where there are many agents, and where there is a single agent. \* \* \* Where there are a number of agents, however, the purchaser may be negotiating with different authorized agents of the owner, and, if so, the agent is entitled to the commission who first brings to the owner a contract satisfactory to him, and which the owner accepts, provided there has been no collusion between the agent and the owner to defeat another agent who has been negotiating with the purchaser.”

Cited and approved in:

*Cissel, Talbot, & Co. v. Hayden*, 41 App. D. C. 477, 479;  
*Taylor v. Maddux, Marshall & Co.*, 55 App. D. C. 254, 4 F. (2d) 447;  
*Goldsmith v. Buckey*, 62 App. D. C. 61, 64 F. (2d) 559.

See also *Rosenfield v. Wall*, 94 Conn. 418, 109 Atl. 409.

As we pointed out before, and with earnestness we again contend, according to the record, Guthridge on behalf of the Government approached respondent because of the fact that Jawish and not petitioner had listed the property in July, 1936, and the property was ultimately leased not by reason of anything done by petitioner or Rosinski. We contend that as a matter of law it must be held that neither petitioner nor Rosinski was the procuring cause of the leasehold engagement.

In *Battle v. Price*, 63 App. D. C. 326, 72 F. (2d) 377, a broker had called certain property to the attention of a person who subsequently bought it. At the time of his so doing the owner was not in a position to sell and the prospective purchaser was not in a position to buy. Subsequently, and without the aid of the broker, the property was sold to the prospective purchaser. The broker sued for

commission. In affirming judgment for the respondent the court said (p. 327):

"To become entitled to a commission, a broker must find a purchaser who is able and willing to buy on the identical terms offered by the seller. (Citing cases) This the petitioner did not do. At no time before he ceased to participate in the trade was Miss Lee (the purchaser) able to go through with the transaction, because it was necessary for her own house to be sold to put her in funds. Nor is there sufficient evidence that Dr. Price (the seller) had named the figure at which he was willing to sell and that Miss Lee had agreed to it. . . . It is true that the petitioner first introduced the eventual purchaser to the respondent, but this circumstance alone, though significant, is not determinative, in the present circumstances."

To the same effect is *Wardman v. Washington Loan and Trust Company*, 67 App. D. C. 184, 186, 90 F. (2d) 429.

It is to be borne in mind that petitioner is not claiming compensation for advising or "hounding" respondent, nor on the basis of the amount of his labor. He seeks compensation for a result which he claims to have accomplished, namely, the procuring of the lease (R. 44, 86-87).

The Court of Appeals in its opinion said (R. 202):

"We find no evidence in the record to support a finding that Whiteford was the procuring cause of the lease made by the Office of Space Control on behalf of the Government Printing Office."

The statement of the Court of Appeals (R. 203) to the effect that if an inference that petitioner was the procuring cause of the lease ever arose, it was rebutted by the testimony, is fully justified by the portion of the testimony of Russell and Guthridge hereinabove quoted (*ante*, pp. 8-9).

The jury is not at liberty to disregard positive testimony uncontradicted and not inherently improbable.

*Brown v. Petersen*, 25 App. D. C. 359, 363.

*Walker v. Warner*, 31 App. D. C. 76, 87-88.

*Chesapeake & Ohio Railway Co. v. Martin*, 283 U. S. 209, 216-217.

We do not, of course, question the doctrine of the various decisions cited on behalf of the petitioner as to when it is proper to direct a verdict, or to direct the entry of judgment contrary to the verdict. Our earnest contention in this case is that the decision of the Court of Appeals was in accord with the rule laid down in those cases, and that the evidence in the case, both as to direct testimony and inferences reasonably to be drawn, was so clearly insufficient, that no judgment except for respondent, was legally justifiable.

Petitioner apparently takes the position that any evidence in favor of a plaintiff, however slight and unsubstantial, requires a submission of the case to the jury. That this is not the law in the Federal Courts is consistently established by a long line of cases. Thus, in *Schuykill and Dauphin Improvement and Railroad Company v. Munson*, 14 Wall. 442, 447 (1872), this Court said:

“Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such character that it would warrant the jury in finding a verdict in favor of that party. (Citing cases) Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to a jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed.”

To the same effect is *Pleasants v. Fant*, 22 Wall. 116, (1875).

In *Gunning v. Cooley*, 281 U. S. 90 (1930), cited by petitioner this Court held (p. 94) that a mere scintilla of evidence is not enough to require the submission of an issue to a jury, and, holding that it is not sufficient merely for the plaintiff to produce *some* evidence, the Court further said (p. 94):

“Where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is, the Court should give a peremptory instruction to the jury.”

In *Pennsylvania Railroad Company v. Chamberlain*, 288 U. S. 333, 343 (1933), this Court said:

“The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but ‘gives scientific certainty to the law in its application to the facts, and promotes the ends of justice’. (citing cases) The scintilla rule has been definitely and repeatedly rejected, so far as the federal courts are concerned.”

Even if, as contended by petitioner, there had been circumstances from which inferences in his favor could have been drawn, they were completely refuted by the testimony of Russell and Guthridge, under the well-settled doctrine that inferences are not permissible in the face of positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the fact actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.

*Pennsylvania Railroad v. Chamberlain*, 288 U. S. 333, 341 (1933).

Petitioner seems to assume that it was obligatory upon respondent to prove affirmatively that petitioner's efforts had no part in the chain of causation which resulted in the lease to the Government Printing Office. No such obligation would arise unless and until petitioner produced substantial evidence in support of his contention. The correctness of the decision of the Court of Appeals rests not only on the denials by the officials of the Space Control staff, but to an even greater extent on petitioner's failure to produce evidence to support his claim that he was the procuring cause of the lease made by the Office of Space Control on behalf of the Government Printing Office (R. 202, 203). Respondent was, therefore, not required to produce the evidence in denial at all, although, as this Court found, it did produce positive evidence to the contrary of the appellee's contention, which was in nowise impaired by the labored attempts of counsel for the petitioner, indirectly, and by means of leading questions, to weaken it (R. 132, 135).

## V.

### CONCLUSION.

It is, therefore, respectfully submitted that the petition for the writ of certiorari should be denied.

LAWRENCE KOENIGSBERGER,  
AUSTIN F. CANFIELD,  
*Counsel for Respondent,*  
Woodward Building,  
Washington, D. C.



DEC 31 1943

CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1943

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No. 485

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GUY WHITEFORD, *Petitioner,*

v.

THE HECHT COMPANY, A CORPORATION, *Respondent.*

---

**PETITION FOR REHEARING OF PETITION FOR WRIT  
OF CERTIORARI.**

---

JAMES C. WILKES,  
JAMES E. ARTIS,  
WALTER R. SCHOENBERG,  
Tower Building, Wash., D. C.,  
*Counsel for Petitioner.*



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OF CERTIORARI.**

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*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Your petitioner, Guy Whiteford, by his counsel, respectfully prays for a rehearing of the petition heretofore made by him in the above entitled cause, which petition prayed that a writ of certiorari be issued out of, and under the seal of, this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, to the end that the decision of that court, rendered in the case numbered and entitled on its docket No. 8246, *The Hecht Company, a corporation, Appellant, v. Guy Whiteford, Appellee*, be reviewed by this Honorable Court.

In support of the present petition for rehearing your petitioner respectfully shows to this Honorable Court:

I. The question presented for the decision of this Court was as follows:

“Is the evidence, as shown by the record, of a nature that fairminded men might reasonably draw different conclusions as to the fact whether the petitioner was the procuring cause of the lease agreement between the respondent and the Federal Government, or is it of a nature that no reasonable man could reach a verdict in favor of the petitioner?” (Brief in Support of Petition, p. 15.)

This question was framed in the light of a rule of law heretofore firmly established in this jurisdiction, to wit, that on a motion for a directed verdict, or for judgment *non obstante veredicto*, the evidence must be construed most favorably to the plaintiff; that to this end the plaintiff is entitled to the full effect of every legitimate inference therefrom and, if, upon the evidence so considered, fairminded men might reasonably draw different conclusions, the case should go to the jury (*Gunning v. Cooley*, 281 U. S. 90, 74 L. Ed. 720; *Jackson v. Capital Transit Co.*, 69 App. D. C. 147, 99 Fed. (2nd) 380).

The denial by this Honorable Court of the petition for writ of certiorari permits, *with regard to the above question*, only two conclusions:

*First:* Either reasonable and fairminded men can draw *but one conclusion* from the evidence as stated, and such conclusion is utterly opposed to the petitioner's right to recover;

*Second:* Or the rule of law, upon which the aforesated question was predicated, does no longer obtain in this jurisdiction.

The adoption of the *first* conclusion, counsel for the petitioner respectfully submit, leads to the unavoidable inference that—

(1) the statement of the trial judge, namely: "Suffice it to say that after having had the benefit of three arguments of counsel, written briefs and a personal review of the testimony, *it is my opinion that reasonable men might differ* on whether the plaintiff's efforts were the procuring cause" (R. 183);

(2) the statement of the dissenting justice in the Court of Appeals, with reference to the evidence, to wit: "What boots it, if, as held in *Gunning v. Cooley, supra*, fairminded men might honestly draw different conclusions?" (R. 206); and

(3) the conclusions drawn by the twelve jurors resulting in the verdict in favor of the petitioner, were all expressions of men to whom the predicate "reasonable" or "fairminded" does not apply.

Since, evidently, such an inference is preposterous, counsel for the petitioner are of the belief that the above stated *first* conclusion, to wit, that only *one* view is possible to be taken from the evidence and that such view is utterly opposed to petitioner's right to recover, has not been, and—being contrary to the *fact* that such evidence *is* susceptible of different interpretations, as to which *fact* even this Honorable Court is powerless to decree its non-existence by judicial fiat—*could not have been*, the cause for the denial of petitioner's application for writ of certiorari.

Consequently, as far as such denial refers to the above question, only the *second* conclusion remains, to wit, that the rule of law, upon which the question submitted for the decision of this Honorable Court was predicated, does no longer obtain in the form as stated. Counsel for the petitioner most urgently submit to this Honorable Court that any abandonment of, or change in, this long established rule of law ought, however, not to be left to inferential or circumstantial ascertainment but be made the subject matter of direct and unequivocal pronouncement by this Honorable Court.

II. The decision of the two justices of the Court of Appeals, forming the majority, has caused consternation among legitimate dealers and brokers in real estate within the District of Columbia. It is respectfully submitted that, by seizing upon the issue of procuring cause, the majority of the court below is seeking simultaneously to advance a certain public policy with regard to contingent fees in the procurement of government contracts, *without, however, positively announcing such public policy*. By stating that the court need not "decide the equally *doubtful* question whether public policy justifies a contingent fee in procuring a government contract" (R. 203), it is submitted, the majority of the court below made not only no contribution to *resolve* such doubt, if it existed, but, on the contrary, causes it to arise and is casting it upon many existing contracts which were entered into in good faith and have, hitherto, following this Court's decision in *Steele v. Drummond*, 275 U. S. 199, 72 L. Ed., 238, and the decision of the court below in *Hanger v. Fitzsimmons*, 50 App. D. C. 384, not been considered as a "departure from recognized legal and moral standards" (*Crocker v. United States*, 240 U. S. 74, 60 L. Ed. 533).

Counsel for the petitioner very respectfully submit that in the present case the review of the jury's determination of the issue of procuring cause should have been governed exclusively by standards of judicial objectivity, and not have been made the occasion—not to say the pretext—for the promotion or *sub rosa* advocacy of a public policy, which has no connection whatsoever with that issue, but, at the most, can only be considered as a desideratum which, by reason of personal preference or social tenet, the two justices of the majority wish to sponsor—though not by direct pronouncement but rather by the indirect method of creating doubt and uncertainty through critical comment (R. 203; dissenting opinion R. 209-211).

III. Counsel for the petitioner know, of course, that, under Rule 38, Subsection 5, of this Honorable Court, "a

review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons therefor*." Counsel for the petitioner further realize that the deep necessity of the times places before this Court problems of a magnitude compared with which the fate or stake of the individual litigants in the case at bar appears to be utterly trivial. If, therefore, the petition for writ of certiorari was denied in the present case because, in the opinion of this Honorable Court, there was no "important reason" therefor, counsel for the petitioner can do nothing but bow—in resignation—to the wisdom of this Honorable Court. They wish, however, to state, that "importance" is a very relative concept, and that,—having in mind this Court's own statement with *all* its implications, to wit:

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." (Jacob v. City of New York, 315 U. S. 752, 86 L. Ed. 1166) —,

they have been led to believe, possibly at the risk of being labeled incorrigible optimists among the legal profession, that the issue here involved, namely, whether an appellate court may substitute its own opinion for the conclusions of the jury, was a reason important enough to warrant the invocation of this Court's supervisory powers. They very respectfully submit that in this small lawsuit there is at hazard, just as surely as in great strifes that sweep the world, an ancient and inalienable right. *If that right cannot find vindication in the courts, it has little chance elsewhere.*

WHEREFORE, your petitioner prays that an order be made by this Court directing a rehearing of the petition for writ of certiorari heretofore filed in this cause, and that upon

such rehearing the said petition be granted and the writ issue as therein prayed for.

Respectfully submitted,

JAMES C. WILKES,  
JAMES E. ARTIS,  
WALTER R. SCHOENBERG,  
Tower Building, Wash., D. C.,  
*Counsel for Petitioner.*

We, the undersigned, counsel for the petitioner in the above entitled cause,

Do HEREBY CERTIFY that the foregoing petition is presented in good faith and not for delay.

Washington, December 30, 1943.

JAMES C. WILKES,  
JAMES E. ARTIS,  
WALTER R. SCHOENBERG,  
Tower Building, Washington,  
D. C.  
*Counsel for Petitioner.*

